BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES W. WARD	)	
Claimant	)	
	)	
VS.	)	
	)	
DUCKWALL ALCO STORES, INC.	)	
Respondent	)	Docket No. 1,024,992
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the May 15, 2007 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 22, 2007.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Caleb M. Kirwan, of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that if the good faith issue is resolved in claimant's favor then work disability is appropriate and the 53 percent wage loss (as of February 15, 2006) is acceptable.

ISSUES

The ALJ awarded claimant a 21 percent functional impairment as well as a 54.67 percent permanent partial general (work) disability, based upon an average of the task loss

analyses offered by Drs. Bieri and Curtis, and an average of claimant's actual wage loss since he left respondent's employ. In doing so, the ALJ expressly concluded that claimant had exhibited a good faith effort to find appropriate post-injury employment between the date he was released to return to work and the regular hearing.

The respondent maintains it is not legally responsible for claimant's present wage loss because claimant had, by virtue of an earlier injury and a number of subsequent surgeries, sustained a task loss well before his 2002 accidental injury. Thus, the argument goes, if claimant is presently unable to work due to an inability to perform his work duties, it is due to his earlier injury and not the accident at issue in this claim. Moreover, respondent argues claimant was able to continually perform his regular work duties after his 2002 accident and up to December 31, 2005, without complaint or modification. Additionally, respondent argues claimant failed to exhibit good faith in retaining his subsequent job with the Werner Trucking Company that would have earned him a comparable wage, and therefore he does not qualify for a work disability under K.S.A. 44-510e(a) .

Claimant maintains that the ALJ's Award should, at a minimum, be affirmed or modified, to reflect a 100 percent wage loss as claimant can no longer work as a result of his 2002 accidental injury.

The only issue to be resolved in this appeal is the nature and extent of claimant's impairment, including claimant's entitlement for work disability under K.S.A. 44-510e(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant sustained a work-related injury to his low back on November 14, 2002 while in the course and scope of his employment with this respondent. Respondent provided claimant with conservative treatment, including a surgical consultation. According to claimant, he was not considered a surgical candidate, most probably because he had already undergone at least 3 surgeries and one follow up procedure to repair the damage to his lumbar spine.

Claimant's first back surgery was in 1975, after which he returned to work performing his regular duties. His second surgery was in 1982, and the third was in 1988 with a follow-up procedure a few months later.[1] Each time, after a period of recovery, claimant returned to his regular work duties. Since his last surgery in 1988, claimant had not sought medical treatment for any back complaints until his work-related injury which

[1] R.H. Trans. at 6-7.

is the focus of this claim. Claimant testified that when he went to work for the respondent in 1998 his back was fine and he was able to do everything that was asked of him up to the time of his compensable accident in November 2002.

After his accident, claimant returned to work and worked continuously up to December 31, 2005. According to the claimant, he required prescription medications in order to continue to perform his work duties. After completing his driving duties he indicated that he would take pain medications in order to relieve his back complaints. Thus, while his job duties remained the same, he was required to take Ibuprofen and Percocet in order to remain on the job.

Effective January 1, 2006, respondent elected to outsource its merchandise deliveries. Claimant was offered a position with the new trucking company, which he accepted. He was to be paid a higher rate per mile and would drive the same route. He would be required to learn a new onboard computer system, a system for which claimant received a half day of training. According to claimant, who has no computer experience whatsoever, he had difficultly understanding the system and its requirements. The system would monitor his activities and provide authority for claimant to begin his route. When certain requirements were not met, he was "shut down". Claimant testified that during the 6 weeks on the job for Werner, he earned $300-500 per week, never as much as he was earning before. And he received no fringe benefits. Claimant also asked for additional training on the computer system, but none was provided.

After approximately 6 weeks claimant quit the job with Werner, finding various employments elsewhere as a truck driver, both working for others and for himself. At no point did these jobs earn him wages 90 percent or more than what he was earning while employed by respondent. Claimant testified that he was frustrated by the Werner job because he felt that Werner was making it difficult if not impossible for him to earn a comparable wage.

Two physicians testified as to claimant's diagnosis, permanent impairment and task loss.[2] Claimant saw Dr. Peter Bieri on May 19, 2005. Upon examination, Dr. Bieri opined that the claimant had a re-herniation of the disc at L4-5 on the right from his work-related accident on November 12, 2002. He assigned a 40 percent whole person impairment with 25 percent attributable to claimant's earlier accident and the remaining 15 percent to the

[2] Respondent's counsel made repeated references to a report authored by Dr. Brent Koprivica, a physician who saw claimant in connection with an earlier injury and asked the Board to take "judicial" [sic] notice of that document. Dr. Koprivica did not testify in this claim and therefore, under K.S.A. 44-519, his report cannot be considered. More problematic is the fact that the report, apparently attached to the settlement documents generated in connection with an earlier workers compensation claim, were never entered into evidence or even proffered for the ALJ's consideration at the Regular Hearing. Thus, Dr. Koprivica's opinions cannot be and were not considered.

whole body for the 2002 accidental injury.[3] Dr. Bieri opined that the claimant should work at the light physical demand level which includes restrictions of limiting lifting to no more than 20 pounds occasionally, 10 pounds frequently and negligible constant lifting, with twisting at the level of the waist, bending and lifting no more than occasionally.

As a result of these restrictions, Dr. Bieri further opined that claimant sustained a task loss of at least 41 percent of the tasks outlined by Terry Cordray.[4] He also examined a list compiled by Dick Santner and testified that claimant was unable to perform 61 percent of the 18 tasks.

Claimant was also examined by Dr. Lynn Curtis on February 14, 2006. Dr. Curtis examined the claimant and noted that the claimant was status post slip and fall injury while lifting on February 12, 2002 which resulted in permanent aggravation of his low back with L4-5 lateral recess stenosis and bilateral radiculopathy, documented L4-5 lateral recess stenosis right, previous surgery X4 low back: three level disc surgery by history, and bilateral lumbar radiculopathy.[5]

Dr. Curtis assigned the claimant an impairment rating of 27 percent to the whole body for bilateral sciatica, motor and sensory loss consistent with MRI findings of new L5 compression and loss of bending and lifting ability. Dr. Curtis suggested that claimant should work in a light duty capacity with no reaching above shoulder level to lift or carry and should seldom lift anything off the floor. When asked about Mr. Santner's task list, Dr. Curtis testified that claimant was unable to perform 67 percent (12) of the 18 listed tasks.

Tom Canfield, senior vice-president of distribution administration for respondent, testified that he was not aware of any permanent work restrictions for the claimant. He also stated that the claimant was still doing the same job he had always done delivering freight to the stores until he stopped working for respondent on December 31, 2005.[6] He did learn sometime in 2005 that claimant was periodically still receiving treatment, medication and injections. Mr. Canfield also stated he was not aware that the claimant was receiving Demerol shots in his back and taking narcotic pain medication while he worked for respondent.

Both vocational experts offered opinions as to claimant's capacity to earn wages. According to Dick Santner, claimant was capable of earning $6-7 hour in light duty or sedentary position and possibly as much as $300-500 per week as a truck driver,

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[3] Bieri Depo., Ex. 3 at 5-6 (May 19, 2006 IME report).

[4] Dr. Bieri was unable to comment on 3 of the 17 tasks and the ALJ concluded that claimant had failed to prove those tasks were "lost" under K.S.A. 44-510e(a).

[5] Curtis Depo., Ex. 3 at 7 (Feb. 14, 2006 IME report).

[6] Canfield Depo. at 7.

assuming he had no loading or unloading duties. In stark contrast is the opinion of Terry Cordray, who testified that based upon the medical records he believed claimant was capable of driving a truck full-time and earning the same wages he was earning while working for respondent and later for Werner.

The ALJ assigned a 21 percent permanent partial impairment to the whole body as a result of claimant's accidental injury. This figure reflects an average of the two impairment ratings offered by Drs. Curtis and Bieri. He went on to evaluate the evidence on the issue of work disability and concluded neither physician's task loss opinion was more persuasive than the other and the three opinions (2 from Dr. Bieri and one from Dr. Curtis) were averaged, yielding a 56.33 percent task loss.

The ALJ then considered the wage loss component of the work disability equation. He concluded claimant had made a good faith effort to find appropriate employment and averaged claimant's actual post injury wages and concluded claimant suffered a 53 percent wage loss.[7] The 56.33 percent task loss was averaged with a 53 percent wage loss as of February 15, 2006 and awarded claimant a 54.67 percent permanent partial general body (work) disability.

The Board has considered the issues addressed by respondent in its appeal and concludes the ALJ's Award should be affirmed in all respects.

The 21 percent functional permanent impairment assessed by the ALJ is, under these facts and circumstances, appropriate. The ALJ apparently found no reason to adopt one functional impairment opinion over the other and as a result, he merely averaged the two. The Board affirms the 21 functional permanent impairment.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of

[7] Neither party disputes this figure. Rather, it is only claimant's good faith in seeking appropriate employment and/or retaining his employment with Werner that is at issue.

> functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[8] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[9]

Respondent first argues that claimant performed his regular duties for nearly 3 years after his accident without accommodation. Thus, he has no task loss and has demonstrated that he is capable of earning a comparable wage. Respondent neglects to recognize that claimant was able to work as a truck driver, the only profession he knows, only with the assistance of narcotic medications and sporadic injections. This evidence is uncontroverted. By using these medications, claimant's task loss was masked and only became evident when he stopped working for respondent and later Werner, and looked for employment elsewhere.

Second, respondent adamantly maintains that claimant *would have* earned a comparable wage had he merely continued, in good faith, his employment with Werner. The difficulty with that argument is that although claimant worked for Werner for 6 weeks, he never made a comparable wage. He testified that he only earned $300-500 per week and he believed his prospects for earning a comparable wage were not good.

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[8] See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[9] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998). But see *Graham v. Dokter Trucking Group*, ___ Kan. ___, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

Claimant indicated that while he was working his same routes and was paid a higher per mile rate, the onboard computer system and Werner's procedures kept him from driving. And in one instance, when he followed the computer's directives and began driving, he was told to "shut down" for a period of time. Claimant asked for more training but none was provided. Although respondent maintains this computer system utilized all the same information claimant had kept manually and was intended to make claimant's job easier, that clearly was not the case. Claimant had no experience operating a computer and had difficulty understanding how the computer worked.

The ALJ found no lack of good faith in claimant's decision, after 6 weeks of less than comparable wages and continued difficulties with the computer system, to quit working for Werner. The Board agrees. And as a result of that decision, claimant's actual wages can be used to establish his work disability, applying K.S.A. 44-510e(a) as it is actually written. Pursuant to the parties' agreement, claimant sustained a 53 percent wage loss. The Board also affirms the 56.33 percent task loss and the resulting 54.67 percent permanent partial general (work) disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 15, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Caleb M. Kirwan, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge